Supreme Court, U.S.
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No. 99-42

IN THE
Supreme Court of the United States

CENTRAL NEWSPAPERS, INC.,

Petitioner,

v.

MICHAEL J. JOHNSON and McKINLEY KELLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
THIRD CIRCUIT COURT OF APPEAL OF THE STATE OF LOUISIANA

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ARGUMENT

I. THE DECISION OF THE LOUISIANA COURT OF APPEAL CONSTITUTES A "FINAL JUDGMENT," AND THIS COURT HAS JURISDICTION TO REVIEW THAT DECISION.

A. The Decision of the Louisiana Court of Appeal Is the Decision of "The Highest Court of a State in Which a Decision Could Be Had."

In his Opposition, Respondent Johnson argues that jurisdiction is lacking in this Court because CNI has not "exhausted" its remedies in the state courts. (Johnson Opposition, at 4). To the contrary, CNI has pursued every available state appellate remedy that the law requires.

After the decision of the Louisiana Court of Appeal, CNI timely sought review by the Louisiana Supreme Court. That court declined to review the Court of Appeal's decision by a 4-3 vote. Pursuant to 28 U.S.C. § 1257, this Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ." Where, as here, a state supreme court declines discretionary review of an intermediate appellate court's decision, the intermediate appellate court is the highest state court in which a decision could be had. Sup. Ct. R. 13.1; *Douglas v. California*, 372 U.S. 353, 354 (1963).

Johnson's reliance on *O'Sullivan v. Boerckel*, 119 S. Ct. 1728 (1999), and *Castille v. Peoples*, 489 U.S. 346 (1989), is misplaced. Both cases address the exhaustion of state court remedies in the context of federal habeas corpus petitions under 28 U.S.C. § 2254, and neither has any bearing here.

B. The Louisiana Court of Appeal Finally Decided the Federal Issue, and its Decision Is a "Final Judgment" Within the Meaning of 28 U.S.C. § 1257 Despite the Pendency of Further State Proceedings.

Johnson's Opposition argues, and Avoyelles Publishing Company's Response suggests, that the Louisiana Court of Appeal's decision is not "final" for purposes of this Court's jurisdiction because the state court proceedings on state law issues have not yet been concluded. This Court's settled jurisprudence interpreting 28 U.S.C. § 1257 holds otherwise.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court recognized several distinct lines of cases "in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257, and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." 420 U.S. at 477. Of particular relevance here is the fourth such category:

> [T]here are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on *nonfederal* grounds, thus rendering unnecessary review of the federal issue by this Court, and where *reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action* rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

> *In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.*

420 U.S. at 482-83 (emphasis added). *See also Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (exercising jurisdiction over petition presenting consitutionality of a pretrial discovery order).

Nine years after *Cox*, in an opinion authored by (now Chief) Justice Rehnquist, the Court relied on *Cox* in support of its decision to review an interlocutory decision of the California Court of Appeal in a press case. In *Calder v. Jones*, 465 U.S. 783 (1984), the Court wrote:

> Although there has not yet been a trial on the merits in this case, the judgment of the California appellate court "is plainly final on the federal issue and is not subject to further review in the state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Accordingly, as in several past cases presenting jurisdictional issues in this posture, "we conclude that the judgment below is final within the meaning of [28 U.S.C.] § 1257."

465 U.S. at 788, n.8. The posture of this case is no different. Though the Louisiana Court of Appeal looked beyond the scope of the narrow state law issue actually presented when it entered the decision challenged here, it nonetheless finally decided the fundamental federal question in a fashion that is binding both on CNI and Avoyelles. The Louisiana Supreme

Court declined to review the Court of Appeal's decision of the federal issue, and any Petition to this Court would have been untimely if CNI had waited for a final result on the state law questions before presenting the federal question now at issue. Sup. Ct. R. 13.1.

Here, as in *Cox*, a significant federal policy is in jeopardy. That policy — First Amendment protection of press publications that violate state law — is so fundamental that the Court has seen fit to consider variants of the basic question on four separate occasions, including in *Cox* itself. *See Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publ. Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Cox*. A decade ago, the question presented by this Petition was expressly reserved in *Florida Star*, and the policy — now squarely presented by the facts in this case — warrants Supreme Court review.

C. *Jefferson v. City of Tarrant* Does Not Deprive This Court of Jurisdiction.

In its Response, Avoyelles suggests that this Court's recent decision in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), might bear on the Court's jurisdiction over this Petition. CNI respectfully disagrees. First, *Jefferson* distinguished *Cox* — it did not purport to overrule *Cox* in any respect. Second, *Jefferson* refused to *expand* the doctrines articulated as the second and third categories in *Cox*. The facts in *Jefferson* did not implicate, and the Court's decision did not consider, the fourth category of review, which supports jurisdiction here. Third, CNI does *not* seek to expand the jurisdictional doctrine articulated in *Cox* — its Petition falls squarely within that doctrine. *See, e.g.*,

Calder, 465 U.S. at 788. Finally, *Jefferson* dealt with a case in which resolution of remaining factual disputes might moot the federal issue. That is not the case here. Respondents do not even allege that CNI engaged in any wrongful conduct in acquiring the information it published, and there is no factual issue analogous to that in *Jefferson*. Here, Respondents' entire theory implicates the federal issue — they seek to impose strict liability under state law for mere publication.

D. CNI Is a Party to the Judgment.

Avoyelles suggests in its Response that CNI lacks Article III standing to petition for a writ of certiorari. As CNI noted in its Petition, the Court of Appeal rendered its decision in Respondents' appeal from the trial court's entry of summary judgment in Avoyelles' favor. [Petition, at 4-5]. The Court of Appeal's decision was based upon the trial court record made in connection with *CNI's* Peremptory Exception, in which the trial court had sustained *CNI's* assertion of a federal constitutional defense. Though CNI did not brief the Avoyelles appeal, the court's far-reaching opinion is equally binding on CNI and Avoyelles under Louisiana law. *See, e.g., Henry v. Ford Motor Company, Inc.*, 519 So. 2d 845 (La. Ct. App. 1988) ("Law of the case" doctrine applied to bar relitigation of an issue by one party when decided by a co-defendant.)

Though Louisiana does permit liberal joinder in appellate proceedings, CNI is a party to the judgment in question, and Avoyelles' citation to *United States ex rel. Louisiana v. Boarman*, 244 U.S. 397 (1917), is inapposite. There, the Court stated the general rule: "[N]o person can bring a writ of error . . . to reverse a judgment who is not a party or privy

to the record." 244 U.S. at 401 (citations omitted). Here, CNI is a party whose federal rights have been finally adjudicated by the judgment of the Court of Appeal. CNI does *not* rely on state law to establish its standing, and it easily satisfies the standing requirements of Article III. In more modern terms:

> Th[e] "irreducible constitutional minimum" of standing requires: (1) that the plaintiff have suffered an "injury in fact" — an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of — the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167 (1997). By depriving CNI of its First Amendment defense to strict liability for republication, the Court of Appeal's decision created the circumstances necessary to confer Article III standing on CNI and Avoyelles alike.

II. RESPONDENT JOHNSON'S OPPOSITION MISSTATES THE RECORD.

In his Opposition, Johnson asserts that ". . . Central Newspapers, Inc., threw care to the wind and again printed the contents of these taped conversations knowing full well

that Aymond's activities were illegal." [Opposition, at 2]. This statement is not reflected anywhere in the record, and it is false. Importantly, the Louisiana Electronic Surveillance Act punishes publication *without* any scienter requirement, and resolution of Johnson's new factual assertion would in no way affect the federal question presented by the Petition.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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